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Nos. 92-593, 92-767 and 92-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

BRIEF FOR APPELLEE FLORIDA STATE CONFERENCE OF NAACP BRANCHES

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QUESTIONS PRESENTED

1. Upon a finding of a violation of Section 2 of the Voting Rights Act with respect to African-Americans and Hispanics in a consolidated trial, should the district court have conducted full remedial proceedings prior to imposing, as a permanent remedy, the plan that it had found violated the Section 2 rights of African-Americans and Hispanics?

2. Whether the district court's factual findings that Florida Senate District 40 is a district in which African-Americans can—and ultimately did in November 1992—elect an African-American candidate of their choice is clearly erroneous, and, if not clearly erroneous, whether this Court need decide hypothetical questions about "influence" districts.

3. Whether the district court's findings with respect to the Florida House districts should be affirmed as not clearly erroneous.

PARTIES TO THE PROCEEDINGS

Respondent adopts the United States' statement.

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BRIEF FOR APPELLEE FLORIDA STATE CONFERENCE OF NAACP BRANCHES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 7a-76a)[1] is reported at 815 Supp. 1550. An earlier decision in the same case with respect to congressional redistricting is reported at 794 F. Supp. 1076.

STATEMENT

The NAACP adopts the statement of the United States with the following additional details about (1) the evidence of Section 2 violations against African-Americans and (2) the evidence that Florida Senate District 40 would elect an African-American candidate.

1. On April 7, 1992, the Florida State Conference of NAACP Branches and twenty-six individual African-American voters (collectively the "NAACP") filed a lawsuit seeking declaratory and injunctive relief against congressional and legislative districts in Florida. *Florida State Conference of NAACP Branches* v. *Chiles*, No. 92-40131-WS (N.D. Fla., filed April 7, 1992). Two days later, the three-judge district court ordered the NAACP lawsuit consolidated with a lawsuit filed by Miguel De Grandy, a Hispanic member of the Florida House of Representatives, and other Hispanic registered voters. On June 26, 1992, the three-judge court ordered the consolidation of a separate lawsuit by the United States (filed on June 23, 1992) with the previously consolidated NAACP and De Grandy actions.

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 92-767, *United States* v. *Florida*. (The district court's judgment (J.S. App. 1a-6a) and opinion (J.S. App. 7a-76a) are also identically paginated in the Appendix to the Jurisdictional Statement in *Johnson* v. *De Grandy*, No. 92-519.) "JA" refers to the Joint Appendix in this Court, "Tr." to the transcript of proceedings in the district court, and "NAACP Ex. 1" to an exhibit introduced into evidence at trial.

Trial began on June 26, 1992 in the consolidated lawsuits.[2] Counsel for the United States, in opening statement, told the court that an additional Hispanic Senate seat in Dade County "will not diminish black voting strength in Dade County. . . ." Vol. I Tr. 47. Counsel for the NAACP replied:

> However, I would note to the Court that the Justice Department's representative has said here today that what they seek to accomplish on behalf of Hispanics in Dade County can be done without harming the interest of blacks in Dade County. Frankly, the NAACP remains unconvinced about that. We take that representation with a grain of salt, and we would like the Court to be very cognizant of that and pay close attention. . . . [Vol. I Tr. 66.]

The evidence at trial demonstrated that (1) African-Americans in Dade County and surrounding areas are politically cohesive, unite in large numbers behind candidates of their choice, and prefer African-American candidates in elections against candidates of other races;[3] (2) racially polarized voting in Dade County severely handicaps the ability of African-American voters to elect candidates of their choice;[4] and (3) African-Americans are sufficiently numerous and geographically compact to permit the drawing of three African-American voting age

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[2] The congressional redistricting issues had previously been resolved, *De Grandy* v. *Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992), and are not now before this Court. However, the district court took judicial notice of the evidence in the congressional redistricting case.

[3] Testimony of Dr. Allan J. Lichtman, JA 369; affidavit of Dr. Dario V. Moreno, JA 177, 182, 184.

[4] Affidavit of Dr. Moreno, JA 186, 191-93; testimony of Dr. Moreno, Vol. II Tr. 82 ("there is a high degree of tension in Dade County between the Afro-American population and the Hispanic population"); testimony of Dr. Lichtman, JA 369 and Vol. III Tr. 36 (instances where white and Hispanic voters in Dade County combined to defeat African-American candidates).

population (VAP) districts in south Florida.[5] Indeed, the so-called Burke-Wallace plan, which was adopted by the Florida House of Representatives but not by the Senate,[6] would have created three such African-American majority Senate districts.

Based on the evidence, the district court made factual findings—not challenged in these consolidated appeals. Pursuant to this Court's opinion in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the district court found that (1) the Hispanics and African-Americans were each "politically cohesive among themselves but were not at all cohesive—and were often at odds—in relation to each other," and "[a]ll of the evidence indicated that Dade County's African-American community is cohesive," J.S. App. 44a, 47a; (2) "[t]here was a substantial amount of testimony . . . that voting in Dade County is racially polarized" and that "African-Americans have also been the victims of block [sic] voting." J.S. App. 49a, 52a; and (3) "[t]he NAACP has established that three geo-

[5] Testimony of John Guthrie, Staff Director of Senate Committee on Reapportionment, Vol. IV Tr. 201-02; *accord*, NAACP Ex. 1 (Burke-Wallace Plan).

[6] JA 427-28. The Burke-Wallace plan, NAACP Ex. 1, was initially ruled inadmissible in the NAACP's case-in-chief, Vol. III Tr. 123, but was later admitted into evidence. Vol. VI Tr. 188. Once admitted, NAACP Ex. 1 cured the previously expressed concern by NAACP counsel that "we were basically precluded from going forward with our Section 2 case," Vol. III Tr. 193, as was made clear in the NAACP closing argument. JA 473-75.

The use of the term "claim" in the United States' brief, P.5, line 1, requires clarification. The word should be limited to the description of the NAACP allegations in the preceding sentence and could not have been used synonymously with "complaint" or "count of a complaint." The district court's initial ruling was *not* that the NAACP's entire "claim" or complaint was untimely but that a particular document, NAACP Ex. 1, which was a constituent part of the "claim" or complaint, was untimely and would not be admitted into evidence. Presentation of oral evidence on this point was initially restricted on similar grounds. In any event, the evidentiary restriction was later reversed. Vol. VI Tr. 188.

graphically compact districts can be drawn in which African-Americans in Dade County would constitute a majority of the VAP and have the potential to elect candidates of their choice. The NAACP submitted a plan which creates three African-American VAP districts." J.S. App. 59a. The district court also made findings about the history of discrimination against African-Americans in Florida and Hispanics in Dade County. J.S. App. 53a-54a.

There was limited evidence before the district court about the effect of an additional Hispanic majority Senate district on African-Americans in Dade County, and the little evidence there was came during testimony in the liability phase of the trial. Cross-examination of expert witness Ronald Weber established that the Dade County Senate districts were "packed" with African-Americans (Vol. VI Tr. 135), that the three African-American districts in NAACP Ex. 1 would definitely elect African-Americans in districts 37 and 39 and possibly in 35 (Vol. VI Tr. 142, 163), and that a fourth Hispanic Senate seat in Dade County would "decimate" the opportunity for African-Americans in Dade County to elect representatives of their choice (Vol. VI Tr 68). Two NAACP witnesses also testified that to draw four Hispanic districts wholly within Dade County would prevent the drawing of two African-American districts wholly within Dade County (Vol. III Tr. 110, 143).

2. Senate District 40 in the state reapportionment plan was "designed to hold together politically cohesive African-American communities in South Dade County."[7] At the time it was drawn, Daryl Jones, an incumbent African-American member of the Florida House of Representatives, had announced his candidacy for Senate District 40. Representative Jones was elected to the House from a

[7] Government Ex. 14 at 3; Vol. I Tr. 39-40 (Florida Senate Response to U.S. Department of Justice Request for Further Explanation of SJR-2G).

district which had 26.7 percent African-American voting age population.[8] Senate District 40 is 34.5 percent African-American VAP and included much of Representative Jones' House District.[9]

Testimony at trial forecast that District 40 would elect an African-American Senator.[10] Based on the evidence, the district court found as a fact that Senate District 40 "performs as a third African-American district without adversely affecting Hispanics in the Dade County area." J.S. App. 66a.

In the November 1992 elections, Senate District 40, which the district court termed "a strong African-American influence district," J.S. App. 64a, did, in fact, elect an African-American Senator, Daryl Jones.[11]

SUMMARY OF ARGUMENT

In this consolidated appeal of three separate lawsuits, not a single party challenges the district court's findings of a Section 2 violation in the Senate districts in Dade County with respect to African-American plaintiffs. These issues are not before the Court and, in any event, the findings were not clearly erroneous.

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[8] *Id.*

[9] *Id.*

[10] Testimony of Leon Russell, first vice president of the Florida State Conference of NAACP Branches. Vol. III Tr. 136 (Daryl Jones, an African-American, will win Senate District 40); testimony of Representative Willie Logan, Chairman of the Florida Caucus of Black State Legislators, Vol. III Tr. 147.

[11] Although the November 1992 election results occurred post-trial and therefore are not in the trial record, this Court can take judicial notice of the certified copy of relevant pages from *Elections 1992; State of Florida Official General Election Returns: Nov. 3, 1992*, Fla. Dept. of State, Div. of Elections (hereinafter "1992 Official General Election Returns") which is attached as an Appendix to this brief. *Brown* v. *Piper*, 91 U.S. 37, 42 (1875) (judicial notice taken of the election of senators).

Failure to conduct a remedy hearing was error. The limited evidence of remedy at the liability trial was not sufficient to permit the court below to throw up its hands and declare that no remedy was possible. If, after a full remedial hearing, it appears that complete relief can be only accorded to one minority group, it should be that minority group which the court below finds to be the most historically disadvantaged in the affected political unit, here African-Americans in the Dade County area.

The proceedings in the Florida Supreme Court were expressly "without prejudice" to later assertion of Voting Rights Act claims that the state court's limited review neither resolved nor provided opportunity to resolve. Questions about "influence" districts, citizen voting age population (CVAP) and sustained electoral success necessary to prove a defense of proportional representation under *Thornburg v. Gingles*, 478 U.S. 30 (1986), are not necessary to the decision by the Court and, if reached, do not in any event affect the liability determination in favor of African-American plaintiffs arising out of the Senate districts in Dade County.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND LIABILITY UNDER SECTION 2 OF THE VOTING RIGHTS ACT IN FAVOR OF AFRICAN-AMERICAN PLAINTIFFS.

Although there was initial confusion in the district court about its liability holding, this confusion was dispelled by the court's opinion. J.S. App. 72a. As clarified, the district court found violations of Section 2 of the Voting Rights Act with respect to the Senate districts in Dade County, but on the record before it declined to order a remedy.

As to the determination of liability to African-American plaintiffs under Section 2 of the Voting Rights Act, the court below was clearly correct and amply supported by

the record.[12] None of the consolidated appeals before this Court challenges those findings of fact or that conclusion of law.

To the extent that several *amici*[13] contend that proof of the three threshold *Gingles* factors does not conclusively establish a Section 2 violation, this argument misstates the district court's holding "that the plaintiffs have satisfied each of the three elements *Gingles* requires *and* that when considered together with the Senate factors, the 'totality of circumstances' show that with respect to Florida's Senate plan, Hispanic and African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act." J.S. App. 30a (emphasis supplied). Even more to the point, *amici* may not raise questions not presented by the parties. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.1 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 532 n.13 (1979). Since none of the parties has challenged the findings of Section 2 violations with respect to vote dilution of African-Americans in Senate districts, the *amici* may not do so.[14]

There was initial confusion below about the proper interplay of liability and remedy in the context of multiple—and perhaps competing—Section 2 claims in a consolidated lawsuit. Ultimately, the district court got it right—a plaintiff does not carry the burden in its liability case to prove the efficacy of any particular remedy. Nothing in the language of the Voting Rights Act of 1965 as amended,[15] the Senate report explaining the 1982 amend-

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[12] *See* the United States' brief, at 6-7.

[13] Brief *amicus curiae* of Anti-Defamation League of B'Nai B'rith at 10 *et seq.*; Brief *amici curiae* of the American Jewish Congress *et al.* at 41.

[14] Although the brief of the American Jewish Congress does not list a "Question Presented," it is apparent from topic heading III B and its entire argument that it is directly attacking this Court's plurality opinion in *Thornburg* v. *Gingles, supra.*

[15] 42 U.S.C. §§ 1973 *et seq.*

ments,[16] or this Court's decision in *Thornburg* v. *Gingles, supra,* imposes that additional burden on plaintiffs—or even contemplates it.

Such a result would be bad law and worse policy. If plaintiffs were required to prove remedy as an additional element of the liability case, it would contravene in large part this Court's prior holdings that the State must be given the first opportunity to submit a plan that remedies a Section 2 violation.[17] Sound considerations of the proper boundaries between legislative and judicial branches vest in the legislature the duty to choose among competing political values in drawing boundaries not otherwise required to redress legal violations. Moreover, as a practical matter, it is usually the State in the first instance that has access to superior data and computer technology to draw political boundaries to redress legal violations.

Accordingly, the liability determination should be affirmed.

II. REMEDIAL PROCEEDINGS WERE NECESSARY.

The district court did not hold a remedial hearing on the Senate districts.[18] Instead, it relied upon some of the evidence that had been introduced at the liability stage in order to support its conclusion in regard to remedy. The error here is manifest. If courts could dispense at will with remedial proceedings, particularly without advance notice to the parties, the liability phases of these already-complicated redistricting proceedings would be turned into a jumble of confusing evidence, as parties tried to make certain that they anticipated and dealt with every possible remedy in the event the court decided to forego the second stage.

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[16] S.Rep. No. 417, 97th Cong., 2d Sess. (1982).

[17] *Connor* v. *Finch*, 431 U.S. 407, 414-15 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (opinion of White, J.).

[18] It held a short, same-day non-evidentiary proceeding on the House remedy.

There are valid reasons for a two-stage approach to redistricting. First, neither the courts nor the parties should have to spend valuable resources dealing with remedies unless it is clear—and the courts have already held—that there is liability. This necessarily means a two-stage process.

Second, although new evidence will undoubtedly be introduced, the parties at the remedial proceeding should also be able to build upon, explain or rebut the evidence relating to remedy tangentially introduced at the liability stage. This is not possible if the liability stage is on-going at the time the remedial evidence is submitted.

Third, holding a separate remedial hearing will give the parties time to develop and present various workable plans that the courts can then consider in light of the entire record. The problems inherent in the alternative approach are apparent from the instant record: during the liability stage, after a very short time to think about the matter, the NAACP representative was not able to construct a plan that he thought would accommodate both the Hispanic and African-American interests. This dilemma may have been subsequently solved, however, after more reflection and computer work-time could be devoted to the task. All of this confusion could easily have been avoided if the district court had made clear from the outset that remedies would not be addressed until after liability had been either proved or disproved.

The district court's remedial conclusion, although defensible if in the expedited context of a motion for preliminary injunction, is particularly suspect here where the court below denied a same-day motion for reconsideration that presented it with the very 4-3 plan that the court had found was not possible. JA 482. In truth, the 4-3 plan in all likelihood would have been proved possible and in any event should have been the subject of remedial proceedings.

In closing argument, counsel for the NAACP suggested the appropriate remedial course for the district court to follow:

> Now, for the sake of argument, assuming that this Court actually is faced with two viable claims in South Florida, how is this Court to resolve that problem? Of course, in an ideal world, the Court could simply order the drawing of four majority Hispanic districts and three majority black districts for the Senate. *If it is possible to accomplish that solution,* the NAACP supports that solution. NAACP does not seek to come into this Court and advance a claim on behalf of its members at the expense of another minority group.
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> * * * *
>
> On the other hand, what happens if this Court ultimately concludes that a 4/3 solution for the Senate in South Florida is not possible? What if there really are two viable and competing and mutually exclusive claims? And I submit to Your Honor that the solution at that point is to in effect give the edge to the minority group that has demonstrated historically the greatest difficulty in achieving political empowerment in South Florida. And I submit to Your Honor that the record is clear that that is African-Americans.
>
> From the Congressional trial this Court has before it Census data that is replete with evidence that in South Florida, in areas of jobs and housing and education and health care, blacks are very, very seriously disadvantaged and comparably more disadvantaged than are Hispanic groups. The record also is replete with evidence that the Hispanic population in South Florida is growing much more rapidly than the black population of South Florida, thereby making it ever more difficult for blacks to elect their candidates of choice. [JA 475-76 (emphasis supplied).]

This is still the NAACP position: if a plan can be devised, as here, where both minority groups can be accommodated, that should be done; but in a situation where the two plans really are mutually exclusive, the advantage should be given to the historically most disadvantaged of the two groups, which in this case was the

African-American group. This approach provides a bright-line test that the NAACP respectfully commends to this Court as preferable to the district court's conclusion of violations for which there is no remedy.

The NAACP is *not* seeking in this Court an outcome as appellee that "would result in greater relief than was awarded . . . by the District Court." *Barry* v. *Varchi*, 443 U.S. 55, 69 n.1 (1979). As explained by the court below, J.S. App. 65a, the State plan created, in effect, a third African-American district in Senate District 40 that subsequently elected African-American Daryl Jones in November 1992.

In any event, while this Court certainly can provide guidance to the district court on the subject of mutually-exclusive remedies, we submit that the entire subject of remedies should be decided in the first instance by the district court at a remedial hearing after all parties are given an opportunity to appear and be heard.

III. THIS COURT NEED NOT REACH ANY HYPOTHETICAL QUESTION ABOUT "INFLUENCE" DISTRICTS.

As noted above, in November 1992 the voters of Florida Senate District 40 elected Daryl Jones, an African-American, to the State Senate.[19] Florida Senate District 40 is thus more than an "influence" district. The court below correctly found as a fact that African-Americans could elect a candidate of their choice in that district. It is a district today represented by an African-American Senator.

In light of this electoral development, the NAACP respectfully suggests that this case is not an appropriate vehicle for abstract speculation about "influence" districts. The entire discussion by the United States at pages 16-18

[19] Appendix at 3a.

of its brief, therefore, need not be addressed.[20] Here, as in *Voinovich*,[21] *Growe* [22] and *Gingles*,[23] hypothetical questions about influence districts can be preserved for another day and a proper case where they are directly presented.

IV. THE DISTRICT COURT PROPERLY DEFERRED JURISDICTION UNDER *GROWE* v. *EMISON* UNTIL STATE PROCEEDINGS WERE CONCLUDED.

Anticipating this Court's decision in *Growe* v. *Emison*, *supra*, the district court stayed this action until the conclusion of all state proceedings. The district court was clearly correct.

Any suggestion that the NAACP and others might be barred by *res judicata* or collateral estoppel by virtue of the Florida Supreme Court's proceedings misconstrues the limited review by that court. There was no full and fair opportunity to litigate the NAACP's Voting Rights Act claims in the two proceedings there. *Allen* v. *McCurry*, 449 U.S. 90 (1980). Indeed, as outlined below, the Florida Supreme Court said so expressly.

The proceedings in the Florida Supreme Court were original actions, by the state attorney general, pursuant to article III, section 16(c) of the Florida Constitution. That section mandates a judgment by the Florida Supreme Court within thirty days regarding the validity of

[20] The NAACP also agrees with the United States' earlier brief in opposition to motion to dismiss or affirm, No. 92-767 at pp. 9-10, that "[t]he difficult questions concerning the definition and legal status of influence districts in Section 2 litigation were not fully developed in this litigation . . ." and with its suggestion that "[t]he need to address those questions can be obviated by remanding the case to the district court for appropriate remedial proceedings." *Id.* at 10.

[21] *Voinovich* v. *Quilter*, 113 S.Ct. 1149, 1157-58 (1993).

[22] *Growe* v. *Emison*, 113 S.Ct. 1075, 1084 n.5 (1993).

[23] *Gingles*, 478 U.S. at 46-47 n.12.

a reapportionment plan. In its May 13, 1992 decision, the Florida Supreme Court acknowledged:

> At the same time, it is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in *Thornburg* v. *Gingles*, within the time constraints of article III, section 16(c). . . . Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation, as explained later in this opinion. [*In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So. 2d 276, 282 (Fla. 1992).]

The court's holding was specifically "without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act." *Id.* at 285-86. This "without prejudice" language means that there was no adjudication on the merits of the Voting Rights Act issues and thus no *res judicata* effect, as this Court has recognized. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990). The NAACP chose to litigate in federal court, which had concurrent jurisdiction. J.S. App. 16a.

Subsequently, when the United States Department of Justice did not preclear Florida's reapportionment under Section 5 of the Voting Rights Act and the Florida legislature reached impasse, the Florida Supreme Court, pursuant to the Florida Constitution, adopted a revised Florida reapportionment plan that resolved the Section 5 objections. The limited nature of the second Florida Supreme Court proceeding was emphasized by its Chief Justice, who stressed that "this Court's review in the present proceeding is limited in scope to DOJ's section 5 preclearance inquiry. . . ." *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 601 So. 2d 543, 548 (1992) (Shaw, C.J., specially concurring).

Neither *res judicata* nor collateral estoppel is therefore applicable here.

V. PROPORTIONAL REPRESENTATION IS NOT AN ABSOLUTE DEFENSE.

Proportional representation is neither an absolute floor nor an absolute ceiling under Section 2 of the Voting Rights Act. The Act itself expressly disclaims that proportional representation is any type of floor for equal political opportunity for minorities. 42 U.S.C. § 1973(b). Neither is proportional representation, without evidence of sustained electoral success, a ceiling on equal political opportunity. This Court so held in *Thornburg* v. *Gingles*, 478 U.S. at 77 (opinion of Brennan, J.); *id.* at 102 (O'Connor, J., concurring in judgment) ("I agree with Justice Brennan that *consistent and sustained success* by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation") (emphasis supplied).

The statutory test under Section 2(b) requires examination of the "totality of the circumstances." As this Court stated in *Gingles*:

> Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." 42 U.S.C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S. Rep. at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' " noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.*, at 29, n. 115 [citations omitted]. The Senate Committee decided, instead, to " 'require an independent consideration of the record.' " S.Rep. 29, n. 115. The Senate Report also

> emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.*, at 30 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. [478 U.S. at 75.]

Applying the "totality of circumstances" test, this Court in *Gingles* held that *sustained* electoral success in *the last six elections* that resulted in proportional representation of African-American residents in House District 23 was a successful defense negating any allegation of unequal opportunity to elect representatives of choice by African-Americans. *Id.* at 77. This Court rejected the contention of appellants "that if a racial minority gains proportional or nearly proportional representation *in a single election*, that fact alone precludes, as a matter of law, finding a § 2 violation." *Id.* at 75 (emphasis supplied).

Similarly here, in the absence of a showing of sustained electoral success, proportional representation is but one factor in the totality of circumstances to be taken into account. The court below considered the evidence, gave it proper weight and committed no error.[24]

Since proportional representation is not an absolute defense but only one of several factors in the "totality of circumstances", issues as to its measurement (*i.e.*, total population, VAP or CVAP) take on less importance in this case and may well vary from case to case depending on local circumstances. The measurement issue was left open by this Court in *Growe* v. *Emison*, 113 S.Ct. at 1083 n.4.

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[24] The court considered evidence both statewide and with respect to the Dade County area. Both are part of the "totality of circumstances"; House appellants unduly emphasize County statistics alone. With respect to African-Americans, the court below made extensive statewide findings about past discrimination in Florida against African-Americans. *See, e.g.*, J.S. App. 53a-54a.

In this case, the district court made detailed findings of fact about the use of VAP,[25] the need for a Hispanic supermajority VAP to take into account lower citizen and registration rates,[26] and the use of a lower majority VAP for African-Americans reflecting recent increases in African-American turnout and voter registration.[27] The court, noting the unavailability of CVAP data, heard testimony of estimates of noncitizenship among Hispanics, found certain estimates to be unreliable,[28] and relied instead on an analysis of past election results by Dr. Lichtman to estimate noncitizen rates.[29]

In short, the district court did precisely what this Court, in *Gingles*, indicated had to be done. It made careful factual findings about the impact of non-citizenship. There is no need for this Court to reach, much less reverse, those findings.

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[25] J.S. App. 31a *et seq.*

[26] J.S. App. 32a *et seq.*

[27] J.A. App. 39a-40a.

[28] J.S. App. 74a (Vinson, J., concurring).

[29] J.S. App. 75a (Vinson, J., concurring).

CONCLUSION

The NAACP respectfully submits, for the reasons set forth above, that the liability findings of the district court should be affirmed, the permanent remedial plan should be vacated and remanded for a full evidentiary hearing, and this Court should not reach or decide hypothetical issues about influence districts and CVAP.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF FLORIDA

DEPARTMENT OF STATE

Division of Elections

I, Jim Smith, Secretary of State of the State of Florida, do hereby certify that the attached are true and correct copies of the 1992 primary and general election results for States Senate District 40, as shown by the records of this office.

[SEAL]

Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the 12th day of May A.D., 1993

/s/ Jim Smith
JIM SMITH
Secretary of State

Democratic September 1 & 8, 1992, Primary Election (Con't)

State Senate

District 40

County	Susan Guber	Daryl L. Jones
Dade	2,409	9,510
Monroe	3,628	2,282
Totals	6,037	11,792
Percent	33.9	66.1

Elected Without Opposition (Con't)

Sixteenth Judicial Circuit
Rand Winter

Eighteenth Judicial Circuit
J. R. Russo

Nineteenth Judicial Circuit
Diamond R. Horne

State Senate

Third Senatorial District
Pat Thomas

Fourth Senatorial District
Charles Williams

Eighth Senatorial District
William G. "Bill" Bankhead

Twenty-First Senatorial District
James T. (Jim) Hargrett, Jr.

Twenty-Second Senatorial District
Don Sullivan

Twenty-Fifth Senatorial District
Fred R. Dudley

Twenty-Ninth Senatorial District
Kenneth C. Jenne, II

Thirty-Second Senatorial District
Howard C. Forman

Thirty-Third Senatorial District
Peter M. Weinstein

Thirty-Sixth Senatorial District
William H. Turner

Thirty-Eighth Senatorial District
Ronald (Ron) A. Silver

Thirty-Ninth Senatorial District
Roberto Casas

Fortieth Senatorial District
Daryl L. Jones

State Representative

Third House District
Buzz Ritchie

Fifth House District
Sam Mitchell

Sixth House District
Scott Clemons

Seventh House District
Robert D. Trammell

Eighth House District
Alfred "Al" Lawson, Jr.

Ninth House District
Hurley W. Rudd

Tenth House District
F. Allen Boyd, Jr.

Fourteenth House District
Anthony "Tony" Hill

Fifteenth House District
Willye F. Dennis

Seventeenth House District
James E. "Jim" King, Jr.

Eighteenth House District
Joe Arnall

Ninteenth House District
John Thrasher

Twenty-Third House District
Cynthia Moore Chestnut

Twenty-Fourth House
District
George Albright

Twenty-Seventh House
District
Jimmy Charles

Thirty-Fourth House District
Bob Starks